

ISSUE DATE: April 24, 1996

DOCKET NO. P-5110/C-94-1139

ORDER TO CEASE UNAUTHORIZED PROVISION OF TELECOMMUNICATIONS
SERVICE IN MINNESOTA

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Joel Jacobs
Tom Burton
Marshall Johnson
Dee Knaak
Don Storm

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Complaint Against Jones
Intercable for Provision of Unauthorized
Telephone Service

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PROCEDURAL HISTORY

On December 9, 1994, Lakedale Telephone Company (Lakedale) filed a formal complaint against Jones Intercable, Inc. (Jones) alleging that Jones was providing telephone service in Minnesota without Commission authority. Lakedale is a local exchange carrier serving a number of exchanges primarily in Wright County. Jones Intercable, Inc. is a cable television operator with service franchises in several Minnesota counties, in particular, Wright County.

On June 27, 1995, the Commission met to consider its jurisdiction over the matter and to establish a comment period. The Commission issued its ORDER ASSERTING JURISDICTION AND ESTABLISHING COMMENT PERIOD on July 5, 1995.

On August 4, 1995, Lakedale, Jones, U S WEST Communications, Inc. (USWC), the Minnesota Department of Public Service (the Department) and the Residential Utilities Division of the Office of the Attorney General (RUD-OAG) submitted Initial Comments.

On August 14, 1995, all five parties submitted Reply Comments.

On April 2, 1996, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

A. Lakedale's Complaint

Lakedale asserted that Jones is providing private line service, via five (5) fibers (fiber optic cables), to Wright-Hennepin Electrical Cooperative (W-H) without Commission authority to provide telephone service. Such private line service (also referred to as special access)

connects W-H's Maple Lake Office with its Rockford office. Rockford is within the Metropolitan Calling Area (MCA). Lakedale stated that Jones' provision of private line service to W-H replaces similar service provided to W-H by Lakedale. Lakedale stated that it has experienced a drop in access revenues since Jones began providing private line service to W-H and asserted that W-H now routes its toll calls to the MCA calls through W-H's Rockford office.

Lakedale complained that Jones is providing local exchange service as defined in Minn. Rules, part 7810.0100, subp. 23:

... telecommunications service provided within local exchange service areas in accordance with the tariffs. It includes the use of exchange facilities required to establish connections between stations within the exchange and between stations and the toll facilities serving the exchange.

Lakedale stated:

(a)t a minimum, Jones is providing facilities between stations and toll facilities serving the exchange. Specifically, Jones is offering special access, which has been declared by the Commission to be a local service." (Lakedale's August 4, 1995 comments, page 6.)

Lakedale asserted that Jones is required to have a certificate of local authority to provide such service (special access service) to W-H and thereby, the public.

Lakedale requested that the Commission find that Jones is engaged in knowing and intentional violations of the law. Lakedale recommended that the Commission refer this matter to the Attorney General for pursuit of civil penalties. Lakedale also requested that the Commission order Jones to cease and desist from further use of its facilities for providing telephone service to anyone until Jones seeks and is granted a certificate of authority.

B. Jones' Reply

Jones acknowledged that it is providing five fiber optic strands to W-H for communications between the company's Maple Lake and Rockford offices and that W-H pays Jones for this service.

Jones does not agree, however, that it is acting as a telephone company nor as a telecommunications carrier, because it does not offer the telecommunications services "for hire" or "to the public."

Jones explained that it provides private line telephone service to W-H as part of a settlement with W-H that allows Jones to continue to use W-H's poles for the deployment of its cable network. Jones stated that it does not provide private line service to any entities other than W-H.

Jones asserted that the Commission has no jurisdiction over its private arrangement with W-H and asked that Lakedale's complaint be dismissed. Jones also stated, however, that if the Commission finds that Jones is a telephone company subject to regulation by the Commission, penalties would not be warranted because it has been acting in good faith.

C. The Department's Comments

The Department urged the Commission to dismiss Lakedale's complaint based on the Commission's Order in the Continental Docket.¹ In that Order, according to the Department, the Commission found that it was not necessary for Continental to have a certificate of authority to provide telecommunications service to the City of St. Paul as a condition of Continental's cable franchise. The Department reasoned that although W-H is not a franchisor as was St. Paul, it does control access to its poles, which Jones has used to provide service to its cable customers. This arrangement is the most economical way for Jones to deploy its cable network. The Department states that W-H, like the City in Continental, is in a position to require the use of the cables as a condition of allowing Jones to use W-H's poles.

The Department did not support Jones's more generalized argument, however, that since it does not offer its services to the public, it does not need to be certified. The Department notes, as did other parties, that this analysis would permit bypass of the local company and undermine the regulatory process by allowing a company capable of providing telephone service to selectively choose its customers, i.e., "cherry pick" only desirable customers while avoiding the obligations of certified telephone companies and telecommunications carriers. The Department believes that this complaint focuses on a unique factual circumstance in which Jones essentially had no alternatives but to comply with W-H's demands. Therefore, the Department recommends that the Commission's Order should be explicitly limited to this unique factual situation. Additionally, the Department stated that if Jones is found to be providing additional telephone services in the future, not only should it be required to apply for a certificate, but the question of substantial penalties should be raised for misleading the Commission.

D. The RUD-OAG's Comments

The RUD-OAG recommended that the Commission require Jones to file for a certificate of authority.

The RUD-OAG supported Lakedale's contention that Jones is providing telephone service without authority from the Commission. The RUD-OAG maintained that companies such as Jones should not be allowed to handpick customers because it threatens the vitality of

¹ In the Matter of an Application by Continental Telecommunications Corporation of Minnesota for Authority to Provide Private Line and Special Access Services in Minnesota, Docket No. P-3123/NA-93-198, ORDER APPROVING PETITION WITH REQUIREMENTS AND REQUIRING FURTHER FILINGS (April 22, 1994).

incumbent telephone companies and raises serious implications for universal service and other regulatory and competitive issues. The RUD-OAG disputed the applicability of the precedent in Continental. The RUD-OAG noted that Jones does not need to provide W-H telephone service as consideration for a franchise. Jones chose this option and is paid a fee for the services it provides to W-H.

The RUD-OAG asserted that when Jones began providing telephone service to a third party, W-H, Jones began offering service “to the public.” The RUD-OAG maintained that the only exception to the “to the public” clause would be the self-provision of internal, private communications. To hold otherwise “opens a floodgate that may never be closed.”

E. Commission Analysis and Action

The parties are in agreement that Jones is providing private line/special access service to W-H. Specifically, Jones makes a portion of its fiber-optic cable available to W-H for a fee. The fiber thus made available carries: (1) employee communications between the two offices; (2) inbound customer calls made to one office and forwarded to the other office; and (3) outbound calls to customers in one area originating from the office located in the other area.

The remaining questions, then, are whether provision of such service requires a certificate and if so, whether Jones’ provision of the service without a certificate was knowing and intentional so as to warrant pursuit of civil penalties.

1. Certificate Required

Having reviewed this matter thoroughly, the Commission concludes that Minnesota law requires that Jones have a certificate of authority to provide the service it has been providing and continues to provide to W-H.

First, Jones is telephone company as defined in Minn. Stat. § 237.01, subd. 2 (1994). That statute defines telephone company as follows:

[A]ny person, firm, association or any corporation, private or municipal, owning or operating any telephone line or telephone exchange for hire, wholly or partly within this state or furnishing any telephone service to the public.

Jones is providing telephone service as defined by the Minnesota Supreme Court² because it supplies facilities for two-way communication: private line (special access) dedicated service.³

² Minnesota Microwave, Inc. Public Service Commission v. Public Service Commission, 190 N.W.2d 661, 665 (1971).

³ The Commission has found in previous Orders that the provision of private line service in the provision of local service which requires a certificate under Minn. Stat. § 237.16

Second, in offering this service to W-H, Jones is offering it “to the public” within the meaning of the statute. That Jones only has one customer for its service at present does not change the nature of its operation.⁴

Third, the exception created in the Continental Order is narrow and applies only to the provision of service to a city as part of a franchise arrangement. Only in this narrow circumstance is a provider of such service not be subject to the Commission’s jurisdiction as a telephone company. The Continental Order made it clear that provision to customers other than the franchisor was provision to the public, did make the provider subject to the Commission’s jurisdiction, and required the company to have a certificate of authority from the Commission for this activity. Continental Order at page 3.⁵

Fourth, Jones’ service is clearly “for hire.” Jones has made it clear that it provided the service to W-H to avoid the significant expense of finding an alternate routing of its cables. Through a combination of barter (W-H allowing Jones to string its cables on W-H’s electricity polls) and cash payment, W-H is paying Jones for Jones’ telephone service. This combination of barter and payment is the kind of valuable consideration that makes it clear that Jones’ provision of private line services to W-H is “for hire.”

To conclude: Jones is a telephone company, is providing telephone service in Minnesota, and is not subject to the narrow exception established in Continental. Accordingly, Jones’ provision of telephone service to W-H is and has been unauthorized, i.e. illegal.

Request for Penalties

Lakedale has requested that the Commission refer Jones’ illegal activity to the Attorney General for penalties. The Commission does not believe that this would be indicated under the circumstances to-date. Jones appears to have operated in good faith to the present. Should it continue to impress the Commission as responsive to conditions as pointed out to them by the Commission in this Order, a referral for penalties would be unwarranted.

(1994). See, e.g., Continental Telecommunications Corporation of Minnesota, supra.

⁴ The Minnesota Supreme Court looks to the nature of the activity rather than to the size or number of customers. The Court has stated: “We cannot conclude, however, that the size of the subscribers establishes the actual character of the service by NWB.” Northwestern Bell Telephone Company v. Minnesota Public Utilities Commission, 420 N.W.2d 646, 649 (Minn. App.1988).

⁵ The Commission stated: “The Commission also agrees with the Department that [the company’s] provision of service beyond the 50% allocated to the City [the franchisor] under its franchise did not fall within the Tri-State exception and was, therefore, the provision of telephone service.” Order at page 3. Bracketed material added.

ORDER

1. Jones Intercable is hereby directed to cease providing all telephone service in Minnesota including privateline/special access service to Wright-Hennepin and shall refrain from providing any such service until it has obtained a certificate of authority to do so from the Commission.
2. Prior to the further provision of telephone service in Minnesota, to W-H or any other customer, Jones shall file for and obtain a certificate of authority to do so from the Commission, pursuant to Minn. Stat. § 237.16 (1994)
3. Within 10 days of this Order, Jones shall file a report regarding its compliance with this Order.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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